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Romalydiawati bt Mohd Sharazlee v Tengku Mansor bin Tengku Abdul Kadir

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HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12B-121–03 OF 2014
LIM CHONG FONG JC
29 OCTOBER 2014

C

Damages — Assessment — Appeal — Appeal against decision of sessions court — Motor road accident — Collision — Respondent had difficulty in standing/sitting in a stationary position or being on his feet for long hours — Respondent terminated from employment after accident and unable to work since accident right to trial — Sessions court awarded loss of earning capacity to respondent amounting to RM125,000 — Whether there was substantial or real risk of respondent not to get another job

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The present appeal arose from the decision of the sessions court judge ('the SCJ') pursuant to motor road accident between the parties. The motorcar driven by the appellant/defendant had collided onto the respondent/plaintiff who was riding a motorcycle. The respondent suffered spinal, rib and leg fractures. The SCJ found the appellant 95% and the respondent 5% liable, respectively. The appeal here was only with regards to the decision of the SCJ in awarding loss of earning capacity to the respondent amounting to RM125,000. The respondent was 28 years old at the time of the accident. The SCJ noted that the medical specialist opined that the respondent had difficulty in standing/sitting in a stationary position or being on his feet for long hours and difficulty to load and unload heavy objects. The respondent was terminated from his employment after the accident and was unable to work since the accident right to the trial and the SOCSO in its report, assessed the respondent's loss of earning capacity at 24% due to his injuries. The appellant contended that the SCJ erred by reason that there was in fact no substantial or real risk of the respondent not to get another job. It was therefore submitted that if the respondent was to find a sedentary job, he would be able to earn more than his previous monthly salary of RM733.

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Held, dismissing the appeal with costs of RM5,000:

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(1) There was a real and significant risk that the respondent will not get another equivalent job in his circumstances. He should be very fortunate if he is able even to get another job. In any event, he could not fairly be denied any compensation. It was also seen from the cases cited by both parties that the court compensated the victim for loss of earning capacity

notwithstanding that the injuries sustained in several of them were less serious. Thus, there was no judicial misdirection that warrants appellate intervention here (see para 16).

[Bahasa Malaysia summary

Rayuan ini berbangkit daripada keputusan hakim mahkamah sesyen ('HMS') berikutan kemalangan jalanraya di antara pihak-pihak. Motokar yang dipandu oleh perayu/defendan telah berlanggar dengan responden/plaintif yang sedang menunggang motosikal. Responden mengalami retak spina, tulang rusuk dan kaki. HMS mendapati perayu bertanggungjawab sebanyak 95% dan responden sebanyak 5%, masing-masing. Rayuan di sini hanya berkaitan kepada keputusan HMS dalam mengawardkan kerugian keupayaan mencari nafkah kepada responden berjumlah sebanyak RM125,000. Responden berumur 28 tahun ketika kemalangan berlaku. HMS menerima bahawa pakar perubatan berpendapat bahawa responden mempunyai kesukaran untuk berdiri/duduk dalam keadaan tidak bergerak atau berdiri untuk masa yang lama dan kesukaran untuk mengangkat dan memunggah barang yang berat. Responden ditamatkan perkhidmatan selepas kemalangan dan tidak dapat bekerja semenjak kemalangan sehingga perbicaraan dan SOCSO dalam laporannya, menaksir kerugian keupayaan mencari nafkah responden sebanyak 24% akibat kecederaannya. Perayu berhujah bahawa HMS tersilap atas alasan bahawa sebenarnya tidak terdapat risiko substansial atau sebenar untuk responden mendapatkan pekerjaan lain. Ia oleh itu berhujah bahawa jika responden dapat pekerjaan yang banyak duduk, dia dapat memperoleh pendapatan lebih daripada gaji bulanan yang yang sebelumnya sebanyak RM733.

Diputuskan, menolak rayuan dengan kos RM5,000:

(1) Terdapat risiko sebenar dan ketara bahawa responden tidak akan mendapat perkerjaan lain yang sama dalam keadaannya. Responden patut bersyukur jika dia boleh mendapatkan pekerjaan lain. Walau bagaimanapun, dia tidak boleh dinafikan dengan apa-apa pampasan. Ia juga dapat dilihat daripada kes-kes yang dirujuk oleh kedua-dua pihak bahawa mahkamah memberi pampasan kepada mangsa yang kehilangan keupayaan mencari nafkah meskipun kecederaan yang dialami adalah banyak dan kurang serius. Oleh itu, tidak terdapat salah arah kehakiman yang mewajarkan campur tangan mahkamah rayuan di sini (lihat perenggan 16).]

Notes

For cases on appeal, see 6 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 278—280.

Cases referred to

Salim bin Dawing v Lim Kah Kat [1986] 2 MLJ 50; [1985] CLJ (Rep) 735 (refd)
Sumarni v Yow Bing Kwong & Anor [2008] 1 MLJ 608, CA (refd)
Tan Swee Tiong v Khor Chin Hau [2002] 1 CLJ 486, HC (refd)
Yang Yap Fong & Anor v Leong Pek Hoon & Anor [1987] 2 MLJ 201; [1987] CLJ (Rep) 419, SC (refd)

Siti Khadijah Mohamed Yunus (Jayadeep Hari & Jamil) for the appellant.
Balbir Singh (S Balbir Singh & Co) for the respondent.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an appeal against the decision of the learned sessions judge dated 4 April 2014 pursuant to motor road accident between the parties.

[2] On 6 June 2012, the motorcar driven by the appellant/defendant bearing registration no JJK 343 collided onto the respondent/plaintiff who was riding motorcycle bearing registration no WVY 408 in Sungai Tangkas, Selangor.

[3] After trial, the learned judge found the appellant 95% and the respondent 5% liable respectively. As the result of the collision, the respondent suffered spinal, rib and leg fractures.

[4] The appeal here is only with regards to the decision of the learned judge award of loss of earning capacity to the respondent amounting to RM 125,000. The respondent was 28 years old at the time of the accident.

[5] I dismissed the appeal with costs of RM5,000 on 15 August 2014 after reading the written submissions of the parties and hearing counsel.

[6] The appellant has on 16 October 2014 filed a further appeal against my decision to the Court of Appeal and accordingly I provide hereinbelow the grounds of my decision.

THE GROUNDS OF THE SESSION COURT

[7] The learned sessions court judge comprehensively dealt with the claim for loss of earning capacity in paras 5–18 of her grounds of judgment.

[8] In gist, she noted that the medical specialist opined that the respondent had difficulty in standing/sitting in a stationary position or being on his feet for

long hours. Also, he had difficulty due to his stiff spine to load and unload heavy objects. The respondent should be able to work at a desk or sedentary job only.

[9] She further noted that the respondent has a diploma in automotive engineering and was employed as a production operator in a factory that manufactures long iron stake bars for car assembly. He was required to supervise and ferry an average of 50 of 8kg bars daily at work. The respondent was terminated from his employment after the accident.

[10] She also noted that the respondent was unable to work since the accident right to the trial and the SOCSO in its report dated 28 January 2014 assessed the respondent's loss of earning capacity at 24% due to his injuries.

[11] The learned judge summarised her findings as follows:

> Persoalannya sekarang adakah beliau berupaya mendapat kerja lain dengan kelulusan diploma dengan kini beliau disahkan kehilangan upaya 24%? Mahkamah dimaklumkan plaintif sudah tidak boleh duduk lama dan/atau berdiri lama di pejabat. Beliau juga tidak berupaya mengangkat benda berat dan menunduk untuk mengangkat barang. Beliau juga tidak boleh berada dalam situasi kerja yang sesak. Mahkamah mengambil judicial notice bahawa perkerjaan juruteknik sendiri memerlukan kekuatan tenaga dan perkerjaan yang agak berat. Dengan kelayakan terhad kepada bidang automotif maka sudah pasti sukar untuk plaintif mendapatkan kerja sebagai juruteknik di bidang lain. Dengan lambakan graduan dan ramai penduduk Malaysia yang masih menggangur dan adalah sukar plaintif bersaing dengan orang yang sihat bagi mendapat satu kerja ringan dengan gaji yang sama dengan gaji sebelum kemalangan memandangkan beliau telah cedera. Bagi menjalankan kerja ringan lain seperti juruwang atau kerani juga memerlukan plaintif duduk lama dan/atau berdiri lama disteysen kerjanya ...
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> Berdasarkan keterangan di hadapan saya khususnya pengakuan wakil majikan bahawa plaintif telah ditamatkan kontrak perkhidmatan akibat kecederaan, dan juga surat sokongan Perkeso serta pendapat pakar sendiri maka saya berpendapat terdapat suatu 'substantial risk or real risk' bagi plaintif untuk mendapat perkerjaan walaupun kerja ringan yang lebih rendah gajinya.

CONTENTIONS AND FINDINGS

[12] The appellant contended that the learned judged erred by reason that there was in fact no substantial or real risk of the respondent not to get another job. He cited the dicta of Mahadev Shankar J (as he then was) in *Salim Dawing v Lim Kah Kat* [1986] 2 MLJ 50 at p 52 ; [1985] CLJ (Rep) 735 at p 737 that:

> The important point to bear in mind seems to me to be that this head of damage is concerned with a plaintiffs loss of earning capacity where as a result of his injury his chances in the future of getting in the labour market work (or work as well paid as

> before the accident) have been diminished by his injury. *What is being compensated is the risk that the plaintiff may lose his employment in future and be at a disadvantage in getting alternative employment because of his injury*.
>
> The judgment of Stephenson LJ makes something else clear. The court was not dealing with a loss or impairment of promotional prospects. It was concerned with the risk of losing the job altogether. *The judge has then to consider first this risk, and secondly if the job is lost, the plaintiff's chances of getting another job. If the risks are negligible no award should be made*. If they are real but not serious then a modest award is called for. If it is serious then a substantial award going into thousands of pounds is in order. (Emphasis added.)

as well as the court of appeal case of *Sumarni v Yow Bing Kwong & Anor* [2008] 1 MLJ 608 where James Foong JCA (as he then was) said at p 621 that:

> [23] From the above authorities, it is explicit that before an award of this nature can be entertained, there must be evidence to show that the plaintiff will face a real or substantial risk in her earning capacity being affected in the future due to the disability she sustained from the motor accident. The medical report did say that the plaintiff will suffer a permanent limp of her left leg which may prevent her from standing and walking for long periods. This would certainly be a handicap but is not a complete impairment to prevent her from performing other tasks. But since her starting job level was only that of a domestic help, the prospect of her getting another job that would pay her the same as what she was earning before the motor accident is low. In my view, her physical shortcoming will expose her to receiving less in the future than what she obtained before the accident. Mr S Sivanesan has submitted a sum of RM60,000 for this head of damages. I think this is far too excessive. It would be fairer if a sum of RM20,000 is awarded to the plaintiffs loss of earning capacity. (Emphasis added.)

[13] It was therefore submitted that if the respondent was to find a sedentary job, he would be able to earn more than his previous monthly salary of RM733.

[14] On the other hand, the respondent contended the injury suffered by the respondent was serious particularly in that his spine was planted with two metal rods on both sides to straighten the spine bone and the left leg had been planted with a plate as well.

[15] Consequently in the physical condition of the respondent, there was a real and significant risk that the respondent would not get a ner job where he has to compete with local university graduates as well as foreign workers seeking employment in this country. He cited the supreme court case of *Yang Yap Fong & Anor v Leong Pek Hoon & Anor* [1987] 2 MLJ 201; [1987] CLJ (Rep) 419 where Syed Agil Barakbah SCJ held:

> The first appellant was entitled to an award for future loss of earning capacity. *The proper test to be applied is whether some time in the future, due to the effect of the injuries*

> *sustained by him, the plaintiff will face a substantial risk of either losing his job or getting a less paid employment. It does not matter whether the plaintiff was in employment or not at the time of the trial so long as the court is satisfied from evidence that there is a real or substantial risk that his earning capacity will be affected in the future*. There is more than sufficient evidence in this case of the likelihood that the first appellant will be able to obtain employment and that in five to ten year's time the injury to his right ankle will aggravate with osteoarthritis setting in and increasing as he grows older and will thereby affect his earning capacity. The learned judge had therefore erred in refusing to make any award for future loss of earning capacity. (Emphasis added.)

as well as the case of *Tan Swee Tiong v Khor Chin Hau* [2002] 1 CLJ 486 where KN Segara J (as he then was) held at p 492 on facts that were similar but of lesser seriousness in the injury sustained:

> There is clear and uncontroverted evidence that the plaintiff, as a result of the injuries, is unable to stand for long nor do heavy work as envisaged in the present employment. Counsel for the defendant has gone to great lengths to point out that the plaintiff has not lost his job and his position in his father's company has not been filled. In assessing the plaintiff's earning capacity the court must assess the plaintiff's capacity to compete in the open market. Clearly, the plaintiff can do a sedentary job and as he has studied up to SPM level (but does not possess an SPM certificate) he ought to be able to secure a job as a clerk and earn about RM700 to RM750 a month. I would thus assess his loss of earning capacity as RM86,400 (RM450 x 12 x 16).

[16] I note that the appellant's challenge was solely on the prospect of the respondent getting a job. This is a mixed question of fact and opinion and I share the views of the learned sessions court judge. I have also independently reviewed the materials in the appeal record and it is my conclusion that there is a real and significant risk that the respondent will not get another equivalent job in his circumstances. He should be very fortunate if he is able even to get another job. In any event, he could not fairly be denied any compensation. It is also seen from the cases cited by both parties that the court compensated the victim for loss of earning capacity notwithstanding that the injuries sustained in several of them were less serious. Thus there is no judicial misdirection that warrants appellate intervention here.

[17] I note that the appellant did not challenge and submit on the quantum of the award of the learned judge.

[18] Accordingly, I dismissed the appeal with costs of RM5,000 to be paid by the respondent.

Appeal dismissed with costs of RM5,000.

Reported by Afiq Mohamad Noor